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**THE INDIRECT INFLUENCE OF PRINCIPLES
OF EUROPEAN COMMUNITY LAW IN THE
UNITED KINGDOM**

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At a time when I can find on my wife's bookshelves a volume entitled "E for Additives"¹, presumably published in the expectation that 'E' will be associated by the public with the series of EEC directives² on preservatives, colouring matters, anti-oxidents, emulsifiers, stabilisers, and thickeners, not to mention gelling agents, for use in foodstuffs, at a time when we have become used to making out our cheques in favour of 'Marks & Spencer plc' rather than Ltd. as a result of the second EEC directive on the harmonisation of company law³, requiring a clear distinction to be made between private companies and public companies in their very names, and when we have all become used to the idea that we take a form E111 with us when we visit other EEC States in order to show that we fall within the scope of the EEC regulation on social security⁴, it can hardly be denied that Community law has had a considerable direct influence in the United Kingdom. Indeed, dairy farmers faced with a reduction in milk quota⁵ under the Common Agricultural Policy, may feel that its influence is all too direct. Similarly, the debate as to the possible narrowing of the bands of value-added tax indicates clearly that our system of taxation of goods and services by value-added tax is in reality the implementation in the United Kingdom of a series of EEC directives⁶, rather than a matter of purely domestic policy.

1 Hanssen: "E for Additives" (Thorsons, Wellingborough 1986).

2 Beginning with the Council Directive of 23 October 1962 on colouring matters (JO 1962, p. 2645).

3 Council Directive 77/91 (OJ 1988, L26/1).

4 Council Regulation 1408/71 (JO 1971 L149/2).

5 Following Council Regulations 1335/86 (OJ 1986 L119/19) and 775/87 (OJ 1987 L78/5).

6 Beginning with Council Directive 67/227 (JO 1967, p. 1301).

However, despite the title of the European Economic Community, the direct influence of its legislation has gone way beyond the strictly economic. Whilst certain aspects of social policy, such as the principle of equal pay for equal work, were included in the original Treaty⁷, anyone applying literal techniques of interpretation to the texts of the EEC Treaty will be hard-pressed to explain how the European Community should issue legislation regulating the quality of drinking water⁸ or bathing water⁹, or the conservation of wild birds¹⁰ before express powers to adopt environmental legislation were conferred on it by the Single European Act, which entered into force in July last year. Indeed, in the mid 1970s, the House of Lords Select Committee on the European Communities was clearly of the opinion that the Community had no power to issue that legislation, which it suggested was ultra vires¹¹.

However, just to point the differences which will be considered later in this paper, the European Court by 1985 felt able to state categorically that protection of the environment was, and I quote, "one of the Community's essential objectives"¹². Debate as to the legitimacy of this approach has, however, now been ended by the entry into force of the Single European Act, which, as well as giving the European Community express power to legislate with regard to environmental protection¹³, also, this audience may be pleased to learn, gives it for the first time express power to support research in universities¹⁴.

My purpose is not, however, to describe the growth in the substantive scope of the legislation of the European Community, or to describe the implementation of that European Community legislation in the United

7 Article 119.

8 Council Directive 80/778 (OJ 1980 L229/11).

9 Council Directive 76/160 (OJ 1976 L31/1).

10 Council Directive 79/409 (OJ 1979 L103/1).

11 Session 1977/8, 22nd Report.

12 Case 240/83 Procureur de la République v. Adbha (1985), ECR 531.

13 Single European Act, art. 25.

14 Ibid., art. 24.

Kingdom. Rather, it is to describe the legal techniques, concepts, and principles developed in the context of European Community law, in particular by the European Court of Justice, and to see to what, if any, extent these techniques, principles or concepts have had an effect within the legal systems of the United Kingdom. Certain techniques, such as the use of purposive or teleological interpretation, have been developed by the European Court largely as a practical solution to the situation in which it finds itself. Certain principles have been derived from specific provisions of the EEC Treaty, such as the principle of Community preference, which underlies the common organisations of agricultural markets under the Common Agricultural Policy, but is only expressly referred to in the EEC Treaty in the context of a transitional provision¹⁵ allowing for the conclusion of long-term contracts between Member States in the days before common organisations were introduced. Similarly, the provision in the agricultural chapter of the EEC Treaty requiring the Community institutions not to discriminate between producers or between consumers, has been generalised into a principle of equality treatment.

Other principles have been derived, whether consciously or unconsciously, from the national legal systems of the Member States¹⁶, and these include such well-known principles as proportionality¹⁷, the protection of legitimate expectations¹⁸, the right to be heard before an adverse decision is taken¹⁹ and, at least to a limited extent, the recognition of legal professional privilege²⁰. Indeed, with regard to the right to be heard and legal professional privilege, lawyers from the U.K. can claim to have played a vital role in persuading the Court to recognise these principles.

15 EEC Treaty, art. 44 (2).

16 See Usher: "The Influence of National Concepts on Decisions of the European Court", 1976, *European Law Review*, p. 359.

17 See the Opinion of A.-G. Dutheillet de Lamoignon in Case 11/70 Internationale Handelsgesellschaft (1970 ECR 1125).

18 See the Opinion of A.-G. Roemer in Case 1/73 Westzucker (1973), ECR 723, 739.

19 Case 17/74 Transocean v. Commission (1974), ECR 1063.

20 Case 155/79 A.M. & S. Europe v. Commission (1982), ECR 1575.

Even in some of its first judgments delivered under the Coal and Steel Treaty in 1954 and 1955²¹, the Court accepted that express provisions of Community law might not in themselves be able to resolve every dispute arising within the jurisdiction of the Court. It was therefore accepted even from this early state that account must be taken of the laws of the different Member States in order to fill in the gaps, and indeed, to interpret Community law itself²².

Furthermore, article 215 of the EEC Treaty, which came into force in 1958, provides that in the case of non-contractual liability the Community shall, "in accordance with the general principles common to the laws of the Member States", make good any damage caused by its institutions or by its servants in the performance of their duties. This express requirement to take account of principles derived from national law has not been interpreted as requiring the Court to take account only of those principles accepted by all the legal systems of the Member States. In 1971, the Court eventually held, and it has consistently since maintained, that the Community institutions may be liable even for the harm caused by their legislation if the applicant can show that such legislation constitutes a sufficiently flagrant violation of a superior rule of law for the protection of the individual²³. This in itself is philosophically intriguing, insofar as it expressly accepts that there are certain legal principles superior to any Community legislation.

However, in 1973, following the accession to the Communities of this country, Ireland and Denmark, it was argued very strongly on behalf of the Council and the Commission in the first available case²⁴, that having regard to the legal systems of the new Member States, there could not be said to be any general legal principle that the Community should be liable for harm caused by its legislation. The Court in its judgment simply repeated its earlier case-law, perhaps thereby indicating that once a

21 See e.g. Case 8/55 Fédéchar v. H.A. (1954 to 1956), ECR 245.

22 Per A.-G. Roemer in Case 6/54 Netherlands v. H.A. (1954 to 1956), ECR 103.

23 Case 5/71 Zuckerfabrik Schöppenstedt (1971), ECR 975.

24 Cases 63 to 69/72 Werhahn v. Council and Commission (1973), ECR 1229.

general principle has been derived by it from the laws of the Member States, subsequent changes in those laws, or in the membership of the Community, do not necessarily prevent that general principle of Community law from continuing to exist as a principle of Community law. The Advocate-General in that case²⁵, however, did suggest that the United Kingdom concept that there can be no State liability for harm caused by legislation was closely correlated to our concept of the sovereignty of Parliament, a concept which had little relevance in the case of legislation which emanated solely from appointed bodies.

It remains to be seen whether the same rule will be applied if the directly elected European Parliament were to become the source of Community legislation. It may, however, be observed that the question whether there may be a liability in damages for harm caused by subordinate legislation did eventually arise before the English courts in the action brought by French poultry producers against the Ministry of Agriculture²⁶, following the judgment of the European Court holding that the United Kingdom restrictions on the import of poultry meat from France were in fact a breach of article 30 of the EEC Treaty and were not justified on health grounds²⁷.

In the Court of Appeal in that action for damages, Lord Justice Parker, who delivered the majority judgment, invoked the case-law of the European Court on the liability of the Community institutions to pay damages for harm caused by legislation as a justification for limiting the circumstances under which such liability might occur when Community law was breached by a United Kingdom minister. Whatever view one may take of the merits of the analogy, and Dr. John Temple Lang, in delivering the Dominik Lasok Lecture earlier in 1987²⁸, made clear what he saw as its demerits, it is a fascinating illustration of a general principle of Community law derived from the laws of the original Member States being received back into the national legal system of a new Member State. In the result, of

25 Advocate-General Roemer.

26 Bourguoin v. MAF (1935), 3 All ER, 585.

27 Case 40/82 Commission v. U.K. (1982), ECR 2793.

28 Temple Lang: "The Duties of National Courts under the Constitutional Law of the European Community" (Exeter 1987).

course, the Ministry of Agriculture settled the case by paying the French producers three and a half million pounds²⁹.

With regard to those general principles which are nowadays compendiously referred to as fundamental rights, the European Court has sought inspiration not only from the national laws of the Member States, but also from the international conventions to which the Member States are parties, in particular the European Convention on Human Rights³⁰. The particular relevance of this for the United Kingdom lies in the fact that, whilst these general principles of Community law may originally have been developed as a control on the Community institutions or as a method of interpreting Community law, they have been extended over the years to control also the activities of Member States when Member States are acting within the framework of European Community law. On the other hand, as is well-known, the European Convention on Human Rights has never been introduced into the domestic legislation of the United Kingdom, so that, for example, our recent distinguished Visiting Professor, Sir Robert Megarry, when he was Vice-Chancellor, found himself faced with an allegation of unlawful phone-tapping, and reached the conclusion that although he thought that the allegations did amount to unlawful phone-tapping in terms of the European Convention on Human Rights as interpreted by the European Court of Human Rights, he could give no remedy to the plaintiff because the Convention was not enforceable in English law³¹. It would nevertheless appear, as a result of the case-law of the European Court of Justice, that is the Court of the EC rather than the Human Rights Court, that insofar as the government of the United Kingdom administers Community law, it may find itself subject to the principles of the Convention on Human Rights.

Indeed, the first judgment of the European Court to refer specifically to particular provisions of the Convention on Human Rights involved the activities of a national government, in this case an attempt by the French

29 Hansard 23 July 1986 Vol. 102 No. 156 Col. 116.

30 See e.g. Case 44/79 Hauer v. Lord Rheinland-Pfalz (1979), ECR 3703.

31 Malone v. Metropolitan Police Commissioner (1979), 2 All ER 620.

authorities to restrict the rights of residence of an Italian worker, who had taken rather too lively an interest in French domestic politics during the 'events' of 1968, by invoking grounds of public policy under article 48 of the EEC Treaty³². The Court there stated that the limitations placed on the powers of Member States to control the movements of the citizens of other Member States under Community law were simply a specific manifestation of a more general principle enshrined in various provisions of the Human Rights Convention providing that no restrictions in the interests of national security or public safety shall be placed on the rights secured by those articles other than such as are necessary for the protection of those interests in a democratic society. The necessary implication of the judgment was that to restrict somebody's rights of residence because of his trade-union activities was not something necessary for the protection of national security or public safety in a democratic society.

A similar implied rebuke, addressed this time to the United Kingdom, may be found in the judgment of the Court concerning Mrs. Johnston's attempts to continue as a policewoman in Northern Ireland³³. Mrs. Johnston was faced with a certificate issued by the Secretary of State under the Northern Ireland Sex Discrimination Order stating that this certificate was "conclusive evidence" that the conditions for derogating from the principle of equal treatment were fulfilled. In that context, the Court held that a provision of an EEC directive, which required Member States to enable all persons who consider themselves wronged by sex discrimination to be able to pursue their claims by judicial process, was a reflection of a general principle of law underlying the constitutional traditions common to the Member States, and underlying also specific provisions of the Human Rights Convention. The Court concluded that this general principle of effective judicial control meant that a certificate which claimed to be conclusive could not allow the competent authority to deprive an individual of the possibility of asserting by judicial

32 Case 36/75 Rutili v. Minister of the Interior (1975), ECR 1219.

33 Case 222/84 Johnston v. Chief Constable of the R.U.C. (15 May 1986).

process the rights conferred by the directive. The necessary implication is that the tradition in the United Kingdom that an administrative authority may issue a supposedly conclusive certificate does not accord with this general principle of effective judicial control.

The aim of this paper is, however, not only to see what influence these principles may have had where United Kingdom authorities are administering Community law, but also to see what, if any, influence they may have had in situations in no way directly governed by Community law. For this purpose, I would like to look at three concepts or principles commonly used by the European Court of Justice: purposive interpretation, the principle of the protection of legitimate expectations, and the principle of proportionality.

It is of course difficult if not impossible to show that certain principles have been developed within the legal systems of the United Kingdom solely because they exist as general principles of Community law. Nevertheless, it may be argued that there has been a remarkable degree of parallelism between English law in particular, and Community, with regard to the development of certain principles since the accession of the United Kingdom to the European Communities.

A particularly notable example concerns not a substantive general principle of Community law, but one of its most widely used techniques, that of purposive or teleological interpretation. This principle has, of course, been of fundamental importance in giving effect to many of the basic provisions of the EEC Treaty. Its development was also encouraged, however, by the fact that the text of any Community legislation is equally authentic in all the official languages of the Community, currently nine. Hence, there are many judgments where passages such as the following, taken from a decision given in 1973³⁴, may be found:

"No argument can be drawn either from any linguistic divergencies between the various language versions, or from the multiplicity of the verbs used in one or other of those versions, as the meaning of the provisions in question must be determined with respect to their objective."

34 Case 61/72 Mij. PPW International v. Hoofdproduktschap voor Akkerbouwprodukten (1973), ECR 301.

A modern example of this involving the United Kingdom can be found in a case³⁵ which arose from what one might think was admirable private enterprise cooperation, transcending ideological barriers, in an area generally regarded as subject to tight regulation. It arose from the fact that a group of British trawlermen wished to obtain some cod, which could not be fished in Community waters, but did happen to be available in waters over which Poland claimed exclusive fishing rights, and where British trawlers had no right to fish. Conversely, some Polish trawlermen, it would appear, wanted some mackerel and herring which were not available in Polish Baltic waters, but were available in Community waters, where Polish boats had no right to fish. Hence, one day a group of English trawlers set off to the Baltic laden with mackerel and herring and met the Polish trawlers in international waters off the Polish coast. The British trawlers cast empty nets into the sea which were then taken over by the Polish trawlers. The Polish trawlers then trawled the nets, but did not take them on board. After the trawl was completed, the ends of the nets were passed to the British trawlers by the Polish trawlers, and the cod was landed onto the British trawlers. The British trawlers then handed over the herring and mackerel to the Polish trawlers and everybody went happily away. When the British trawlers landed in the United Kingdom, the British Customs authorities, after some administrative dispute, classified the cod as being British, and therefore not liable to pay common customs tariff duty, because under the relevant EEC legislation³⁶, fish are to be treated as wholly obtained in one country if they are "taken from the sea" by vessels registered in that country and flying its flag. The British view essentially was that since the nets were pulled from the sea by the British trawlers, the fish was taken from the sea by the British trawlers. No more would doubtless have been heard of this spot of private enterprise if those involved had been able to keep quiet about it, but given the ways of fishermen, it apparently soon became common knowledge, led to questions in the European Parliament, and eventually to proceedings by the Commission against the

35 Case 100/84 Commission v. U.K. (1985), ECR 1169.

36 Council Regulation 802/68 (JO 1968 L148/1).

United Kingdom. The Commission's argument was essentially that fish were taken from the sea when the net closed around them, irrespective of when they were physically hauled out of the sea.

Faced with this dispute, the Court first looked at the texts of the Regulation, and noted that the French version used the phrase "extraits de la mer", which appeared to support the British argument whereas, for example, the German text used the word "gefangen" meaning 'caught', which rather supported the Commission's argument. After referring also to the Greek, Italian and Dutch versions (but not, apparently, the Danish), the Court concluded that a comparative examination of the various language versions did not enable a conclusion to be reached in favour of any of the arguments put forward, and so no legal consequences could be based on the terminology used. It therefore expressly turned to consider the purpose and the general scheme of the Regulation determining the origin of goods for customs purposes, and came to the conclusion that where a fishing operation was carried out by a number of vessels registered in different countries, then the origin should in principle depend on the flag flown by the vessel which performed the essential part of the operation of catching them. Faced with the fundamental question of legal philosophy as to when a free object becomes property, the Court took the view that the essential part of catching fish is locating the fish and separating them from the sea by netting them, and that simply hauling the nets out of the sea is not the essential part of the operation. Whatever one may think of the Court's analysis, this judgment at least indicates its general approach to such problems.

In England, on the other hand, whilst such an approach was not totally unknown, our tradition was to base interpretation very much upon the subtle meaning of the words used, and there was therefore a temptation to use this technique in the context of Community law. Hence, in the case R. v. Henn and Darby³⁷, where the question arose whether our prohibition on the importation of obscene articles constituted a measure equivalent to a quantitative restriction on imports from another Member

37 (1978), 3 All ER 1190.

State prohibited under article 30 of the EEC Treaty, the basic provision of that Treaty with regard to the free movement of goods, the then Lord Chief Justice, Lord Widgery suggested that where there was a total prohibition this could not be a "quantitative" restriction, because there was no restriction by reference to a quantity. It does not take much imagination to envisage the extent to which there would be a common market if Member States really were in fact free to impose total prohibitions on the entry of goods from other Member States. Article 30 has in fact been interpreted by the European Court as prohibiting "rules enacted by Member States which are capable of hindering directly or indirectly, actually or potentially, intra-Community trade". Fortunately, the House of Lords showed a greater awareness of the case-law of the European Court, and referred the matter to that Court for a preliminary ruling³⁸. The European Court, as might have been expected by the Community lawyer, held that the prohibition was indeed a measure equivalent to a quantitative restriction, but that it could be justified under article 36 of the EEC Treaty on grounds of public morality.

However, when the attempt was made only ten years ago by Lord Denning in the Court of Appeal to use the European Court's technique in a context which did not involve Community law³⁹, a technique which he described as being called in English by "strange" words "the schematic and teleological" method of interpretation, but which he described with approval as involving the resolution of problems by looking at the design and purpose of the legislation, a rather different view was taken in the House of Lords. There Lord Wilberforce said⁴⁰, in as many words, that he did not get assistance from methods said to be used in interpreting the EEC Treaty by the Court of Justice of the European Communities.

By 1985, however, English judges dealing even with matters of lawyers' law could be found expressly making use of purposive interpretation and calling it by that name. So, in Bank of Scotland v. Grimes⁴¹, the judges

38 Case 34/79 R.v. Henn and Darby (1979), ECR 3795.

39 Buchanan v. Babco (1977), 1 All ER 518.

40 (1977), 3 All ER 1048 at p. 1053.

41 (1985), 2 All ER 254.

of the Court of Appeal expressly stated that they were giving a purposive interpretation to section 8 of the Administration of Justice Act 1973, in order to be able to give relief from loss of possession of his house to a householder able to pay off outstanding arrears under his mortgage, not only where the mortgage was of the traditional instalment type (which fell clearly within the provision), but also where it was of the endowment type (which did not fall so easily within the express words of the section).

A similar approach has also been taken in the House of Lords. In Smalley v. Crown Court, Warwick⁴², Lord Bridge looked at the purpose of sections 28 and 29 of the Supreme Court Act 1981. This excludes from judicial review a decision of the Crown Court relating to trial on indictment, and it no doubt excludes such a decision from judicial review because the Criminal Appeal Act 1968 provided a special system of criminal appeals. However, in this case he was concerned with an order of the Crown Court estreating the recognizance of a surety for a defendant who failed to surrender to his bail at the Crown Court. Unfortunately, the system of appeals laid down by the Criminal Appeal Act is only available to the person who has been tried on indictment. Therefore, the surety, that is the person who put up the financial guarantee that the defendant would appear, sought judicial review of the order. Although the order was in a literal sense a decision relating to trial on indictment, Lord Bridge said that he could discern no intelligible legislative purpose why the exclusion from judicial review of matters relating to trial on indictment should apply to such an order, since the order could not affect the conduct of the trial and there was no sensible reason why an aggrieved surety should not have a remedy by way of judicial review.

There does, however, appear to be a limit, in that the English courts have been unwilling to adopt a purposive interpretation where it would prevent an individual deriving a benefit to which he would be entitled on a literal interpretation. This appears from the action brought against the Broadcasting Complaints Commission by Dr. David Owen⁴³, which incidentally contains one of the clearest statements of the acceptance

42 (1985), 1 All ER 769 at p. 779.

43 R. v. Broadcasting Complaints Commission ex p. Owen (1985), 2 All ER 522.

of the principle of purposive interpretation, when Lord Justice May said: "On modern principles of construction it is clearly legitimate to adopt a purposive approach and to hold that a statutory provision does apply to a given situation when it was clearly intended to do so even though it may not so apply on a strict literal interpretation". However, he added that he did not think that the converse was true and that it was not legitimate to adopt a purposive construction so as to preclude the application of a statute to a situation to which on its purely literal construction it would apply.

By way of contrast, it has to be admitted that the European Court of Justice has been quite prepared to apply purposive interpretation against the individual who might have expected to rely on the literal interpretation of Community legislation. This is illustrated by the stories of the unfortunate Messrs. Padovani⁴⁴ and von Menges⁴⁵. Mr. Padovani tried to take advantage of an EEC Regulation which provided for a reduction in the level of import levies charged on imports of cereals when such cereals were imported by sea into Italy. The boat containing his cereals arrived at an Italian port and all the customs formalities relating to the importation of the cereals were carried out in that Italian port, so that the goods were technically imported into Italy. However, the boat did not unload in the Italian port; instead it sailed round to the Netherlands. It was held by the Court that although Mr. Padovani's importation might have fallen within the literal words of the regulation, nevertheless the reduction in levy for cereals imported by sea into Italy was intended to take account of the high port and unloading costs incurred in Italy, and was therefore only available if the cereals were not only technically imported, but also actually unloaded in Italy.

Mr. von Menges, on the other hand, took advantage of legislation designed to encourage farmers to leave dairy production. He did indeed get rid of his herd of dairy cows as required under the regulation, but he replaced them with a flock of sheep, which he used not for producing

44 Case 69/84 Padovani (1985), ECR 1859.

45 Case 109/84 von Menges (1985), ECR 1289.

meat or wool but for producing sheep's milk. Whilst sheep's milk does not technically fall within the common organisation of the market in milk, the Court nevertheless held that it competed with products falling within that organisation, so that his new activity was not helping to reduce the surplus of dairy production, which was the aim of the scheme, and therefore he could not take advantage of the subsidies available under the dairy conversion scheme.

The principle of the protection of legitimate expectation, to turn to one of the major general principles of European Community Law, is generally regarded as having been inspired by the German principle of "Vertrauensschutz"⁴⁶, a principle held by the German courts to underlie certain provisions of the German Basic Law. In the form developed by the ECJ, expectations may be protected even against general binding legislation in certain circumstances. Perhaps the classic example is to be found in a 1973 judgment given in the context of a dispute between the Commission and the Council as to the calculation of annual increases in the salaries of officials of the European Communities⁴⁷. That case concerned a decision, in the sense of the record of an agreement reached within the Council rather than a binding legal act, taken by the Council in 1972 to apply for a period of three years a particular system of adjusting salaries of Community officials. However, later in 1972, as a result of the effect of the oil price explosion on salaries and the cost of living in the various Member States, the Council issued a Regulation, which is a general binding legal act, imposing staff salary increases which were not in accordance with the terms of the decision i.e. they were lower. In such circumstances, the Commission tends to act as shop steward, and brought the present proceedings. The basic question at issue was whether the Council was bound by its earlier informal decision, so that it could not validly issue the binding regulation. In its judgment, the Court said that taking account of the particular employer-staff relationship, the rule of protection of the confidence that the staff could have that the authorities would respect undertakings of this nature

46 See Usher, op.cit. at p. 364.

47 Case 81/72 Commission v. Council (1973), ECR 575 at p. 584.

implied that the decision bound the Council in its future action. The Court added that whilst this rule was primarily applicable to individual decisions, the possibility could not by any means be excluded that it should relate, when appropriate, to the exercise of more general powers. In the result, the Court held that the regulation was invalid as contravening the policy laid down by the decision taken early in 1972.

It may be observed that the Court, in so deciding, did not follow the opinion of the Advocate-General in that case, the British Advocate-General, now Warner J., who cited case-law in the Member States, and in particular England and France, to suggest that there was no such principle⁴⁸. Indeed, it may be suggested that the traditional English attitude that the Crown, that is central government, could not fetter its future executive action was best shown in a case which arose from the First World War⁴⁹. It would appear that the Swedish owners of a ship were induced to send it to a British port by a letter from the British legation in Stockholm stating that it would be released if it sailed to the United Kingdom with a cargo of approved goods. Having arrived in a British port with these goods, the ship was then refused clearance; the owners sued for damages, but it was held that the government could not hamper its freedom of action in matters which concerned the welfare of the State. Such a principle had also been applied to the activities of local authorities and public corporations. There were, however, exceptions. In 1972, just before the United Kingdom's accession, legitimate expectations (which it must be said, was a phrase introduced into English law by Lord Denning as early as 1969)⁵⁰, were enforced by the English Court of Appeal against a local government authority, if not a central government authority, in a case involving Liverpool corporation and the licensing of taxis⁵¹. Under powers given by the Town Police Clauses Act of 1847 to license such a number of hackney coaches or carriages as they think fit in their area,

48 (1973), ECR 575 at pp. 592-595.

49 Rederiaktiebolaget Amphitrite (1921), 3 QB 500.

50 Schmidt v. Secretary of State for Home Affairs (1969), 1 All ER 904.

51 R. v. Liverpool Corporation ex p. Liverpool Taxi Fleet Operators' Association (1972), 2 All ER 589.

Liverpool corporation had since 1948 limited the number of taxis to 300. At a Council meeting in August 1971, an undertaking was given that this number would not be increased until a private bill controlling private hire cars had been enacted. Nevertheless, in December 1971, the Council resolved to increase the number of licences for 1972. This was challenged by the Taxi Fleet Operators Association, and it was held by the Court of Appeal that although the Council must make up its own mind as to the policy it wished to follow, it must act fairly to all concerned, notably to present licensees and to would-be licensees. Hence, although it could depart from its undertaking, it must do so after due and proper consideration of the representations of all those interested. In the result, an order was issued to the corporation preventing it from acting on its resolution to increase the number of licences until it had heard representations on behalf of those interested, including the Taxi Fleet Operators Association.

The interesting modern development in this area, however, is that the House of Lords appears now to have held that legitimate expectations may also be enforced against central government authorities, even against a Minister acting under powers derived from the royal prerogative, and in a context not totally dissimilar from that involved in the dispute between the European Communities Commission and Council which has just been mentioned.

The case was the famous GCHQ dispute⁵², much renowned in the popular press as relating to questions of national security, but to the lawyer much more interesting for its discussion of legitimate expectation. The Civil Service unions there sought judicial review of an instruction issued by the Minister of the Civil Service, that is the Prime Minister, that the terms and conditions of civil servants at GCHQ should be revised so as to exclude membership of any trade-union other than a departmental staff association approved by the Director of GCHQ. The argument put on behalf

52 Council of Civil Service Unions v. Minister for the Civil Service (1984), 3 All ER 935.

of the unions was essentially that the employees of GCHQ had a legitimate expectation that there would be prior consultation before any important change was made in their conditions of service. The legal basis of this claim was clearly analysed by Lord Fraser as being that even where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and, if so, the courts will protect his expectation by judicial review as a matter of public law. Indeed, he went so far as to say that legitimate expectations of the type at issue would always relate to a benefit or privilege to which a claimant had no right in private law, and it might even be to one which conflicted with his private law rights, presumably the express terms of employment. The evidence was that since GCHQ began in 1947, prior consultation had been the invariable rule when conditions of service were to be significantly altered, and he concluded that if there had been no question of national security involved, the unions would have had a legitimate expectation that the Minister would consult them before issuing the instruction.

Leaving aside the obvious continental influence of the terminology of public law and private law which has become fashionable since 1982 in administrative law cases before the House of Lords, dare one suggest that here, just as in the European Court's judgment in Commission v. Council⁵³, there is a recognition that expectations can be derived which can override the strict legal situation and which will be protected by the courts.

An illustration which did not involve questions of national security can be found in Ex parte Khan⁵⁴. It was there held that the recipient of a Home Office circular would have a legitimate expectation that the criteria and procedures laid down in that circular for the admission of a child into the United Kingdom for the purpose of her adoption would be followed, and the Secretary of State could only apply different criteria and procedures if he first gave the recipient of the circular a proper opportunity to make representations as to why such different criteria and procedures

53 See note 47 supra.

54 (1985), 1 All ER 40.

should not be followed in his case.

It is of course difficult, as I have already indicated, to determine the extent to which this parallelism between the development of the protection of legitimate expectations in English administrative law, and the use of that principle in Community law, is conscious. Nevertheless, in his statement of the grounds for judicial review in English law set out in his speech in the GCHQ case, Lord Diplock listed in his own way the generally recognised grounds but added⁵⁵: "That is not to say that further developments on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of proportionality which is recognised in the administrative law of several of our fellow members of the European Economic Community". Obviously, we are here faced with an express recognition of the possibility of the deliberate incorporation of principles derived from other Member States of the Community and from Community law itself into English administrative law.

However, two questions arise. Firstly, what is this principle of proportionality? Secondly, is it really a principle which is so far unknown in English law?

Once again, this is a principle which would appear to have entered into Community law via German law, where the "Verhältnismäßigkeitsgrundsatz" has been held to be a principle underlying certain provisions of the Basic Law⁵⁶. Whilst its early use in Community law amounted to little more than an assertion with regard to the activities of coal and steel undertakings that the punishment must fit the crime, the classic definition of proportionality in Community law is that given by Advocate-General Dutheillet de Lamothe in 1970⁵⁷. This is that citizens may only have imposed on them, for the purposes of the public interest, obligations which are strictly ne-

55 (1984), 3 All ER 935 at p. 950.

56 See Usher, op.cit. at p. 363.

57 Case 11/70 Internationale Handelsgesellschaft (1970), ECR 1125 at p. 1148.

cessary for those purposes to be attained. A clear illustration of the principle's use in practice may be found in what are usually referred to as the skimmed milk powder cases⁵⁸. These involved a Council Regulation which in effect required manufacturers of animal foodstuffs to incorporate intervention skimmed milk powder into their products at a price three times that of the soya husks for which it was substituted, thereby representing an early attempt to remove the skimmed milk powder mountain. It was held that this Regulation imposed an obligation which was disproportionate, imposing a discriminatory distribution of the burden of costs between the various agricultural sectors, and that it was not something that was necessary to attain the objective of reducing stocks of milk powder.

Although the import of Lord Diplock's remarks is that the principle of proportionality is not one with which English courts are familiar, nevertheless English courts have not been backward in referring questions to the European Court asking whether a particular provision of Community law did breach that principle. This is illustrated by the case of E.D. and F. Man v. Intervention Board⁵⁹ which involved EEC legislation requiring a person who successfully tendered for the export of sugar to lodge a security, in this case £ 1,670,000, to ensure that the export actually took place. Under the terms of the relevant EEC Regulation, that security was to be forfeited if an export licence was not applied for within a specified time limit. Man Sugar were for various reasons, three and three-quarter hours late in applying for their export licence, and the English judge, Mr. Justice Gladwell, referred to the European Court the question whether the EEC Regulation, insofar as it required the whole security to be forfeited for a failure to apply for the export licence on time, breached the principle of proportionality, particularly since there was still in fact enough time actually to carry out the export transaction. The European Court held that the principle was indeed breached, a conclusion it reached by applying a purposive interpretation to the relevant regula-

58 Cases 114/76, 116/76, 119-120/76 Behla-Mühle etc. (1977), ECR 1211, 1247, 1269.

59 Case 181/84. (1985), ECR 2889.

tion. The basis of the decision was that the Court in interpreting the legislation made a distinction between what it regarded as the primary obligation, actually to carry out the export transaction, and the secondary obligation to apply for an export licence within a specific time; in the view of the Court, to penalise a failure to comply with the secondary obligation as severely as a failure to comply with the primary obligation would breach the principle of proportionality.

As has already been indicated, this principle may be applied not only against the Community institutions, but also against national authorities in the context of Community law, and it has thus occurred that the United Kingdom has fallen foul of the principle at least twice with regard to measures restricting the movement of goods which were claimed to be justified on grounds of the protection of health under article 36 of the EEC Treaty.

The first example is the famous poultrymeat case⁶⁰, where a prohibition was imposed in 1981 on imports into Great Britain of poultrymeat and eggs from all other Member States except Denmark and Ireland, allegedly to prevent the outbreak of Newcastle disease. Quite apart from the fact that the European Court took the view that in the circumstances this was not a seriously considered health policy anyway, it stated that the measures taken by the United Kingdom were not proportionate to the objective they pursued. In other words, a total prohibition on imports could only be justified if the United Kingdom could show that that was the only possibility open to it, and the European Court was of the opinion that less stringent measures could have been used.

The question of proportionality was considered also in the context of the importation of UHT milk into this country⁶¹. The United Kingdom at the relevant time required that imported UHT milk should be re-treated in the United Kingdom, thereby destroying any economic advantage in importing the stuff and to all intents and purposes constituting a prohibition on

60 Case 40/82 Commission v. U.K. (1982) ECR 2793.

61 Case 124/81 Commission v. U.K. (1983) ECR 203.

imports. The European Court held that the United Kingdom's health requirements could equally well be met by a requirement that importers produce certificates issued by the competent authorities of the exporting Member State, coupled with controls by means of samples.

The question remains, however, whether the acceptance of the principle of proportionality would in reality constitute the acceptance of a novel doctrine into English law. The terminology of proportionality, at least with regard to sanctions, has indeed been used in English law, as has been pointed out by my former colleagues at University College London, Jeffrey Jowell and Anthony Lester⁶². In R. v. Barnsley M.B.C. ex. p. Hook⁶³ it was held to be disproportionate to ban a market trader, Mr. Hook, from trading at Barnsley market for the rest of his life because he relieved himself in a side street near the market after the public conveniences had closed. More generally, the President of the European Court, Lord MacKenzie-Stuart, in delivering the presidential address to the Holdsworth Club in the University of Birmingham in 1986⁶⁴, went on record as asking whether proportionality was anything other than the concept of reasonableness? The words 'reasonable' and 'reasonableness' are, of course, part of the stock-in-trade of English law, although it might be suggested that they seem to have different meanings in different contexts.

In the context of judicial control of the administration in England, unreasonableness was equated by Lord Diplock in his speech in the GCHQ case with irrationality⁶⁵, that is a decision which is so outrageous in its defiance of logic or of accepted moral standards, that no sensible person who had applied his mind to the question to be decided could have arrived at it. If only such conduct is unreasonable, then there is indeed a wide gulf between the English concept of reasonableness and the European Community concept of proportionality. One could, however,

62 (1987) Public Law.

63 (1976), 3 All ER, 452.

64 "Control of Power within the European Communities", Birmingham 1986.

65 (1984), 3 All ER, 935, at p. 951.

suggest that a somewhat less rigorous test of what is unreasonable has in reality been applied in a number of instances with regard to the activities of certain local authorities or planning authorities. Lord MacKenzie-Stuart has suggested that the difference is one of degree rather than of substance: might it be submitted that perhaps it is really a difference of emphasis? The concept of reasonableness in English administrative law appears to take as its starting point the rationality or otherwise of the conduct of the authority in question⁶⁶, although of course the consequences of that conduct may be a relevant factor. On the other hand, the European Community concept of proportionality would appear to take as its starting point the consequences of the authorities' actions for the subject of the law, i.e. it asks the question: what is the burden imposed on the subject? - though of course it may take account of the rationality of what the authority did as well. Dare one suggest that a change of emphasis towards that which appears to be used in Community law would be most welcome.

In this very context, it may be observed that in an article published in October 1987 in the 50th anniversary issue of the Modern Law Review on "English Legal Scholarship", much of the tone of which is rather gloomy, Professor Geoffrey Wilson of Warwick University has nevertheless given an unsolicited testimonial to the beneficial effects of inculcating awareness of another legal system⁶⁷. He states that while English judges might resist the idea of abruptly importing the 'continental' notion of proportionality when evaluating the reasonableness of a public body's behaviour, yet, having become aware of it as a concept, they might nonetheless approach the elaboration of the accepted criteria of reasonableness in a different way.

Be that as it may, we have now reached the situation where a senior judge does feel able openly to state a willingness to take conscious account of a principle derived from the laws of the other Member States and held to be a general principle of Community Law. Even without such conscious recognition, there has been an intriguing degree of parallel development with regard to certain principles in English law and Euro-

66 Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation (1948), 1 KB 223.

67 (1987), MLR 818.

pean Community law, and of course European Community law has become a back-door method by which the principles of the European Convention on Human Rights, which are not recognised as existing in our domestic law, may nonetheless have some effect within this country. But perhaps most notable of all, in the context of techniques of interpretation there appears to have been a quiet revolution, so that what we were told was a strange system from which no assistance could be derived appears to be used virtually on a daily basis even in the context of lawyers' law. We are no doubt all familiar with Lord Denning's metaphors about incoming tides in the context of European Community law⁶⁸. However, I am indebted to the principal assistant solicitor to Her Majesty's Customs & Excise, a body which nowadays spends much of its time collecting CCT duties, and administering a system of internal taxation derived from EC law, for drawing my attention to a passage of 19th century poetry by one A.H. Clough⁶⁹ which is perhaps more apposite in the context of the present paper:

"For while the tired waves, vainly breaking,
Seem here no painful inch to gain,
Far back through creeks and inlets making,
Comes silent, flooding in, the main."

68 See Bulmer v. Bollinger (1974), 2 All ER, 1226.

69 "Say not the Struggle Naught Availleth".